

NOT FOR PUBLICATION

FOR UPLOAD

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Parveen Khan,)	
)	
Plaintiff,)	Civ. No. 2000-223
)	
v.)	
)	
Joseph Soleimani, Taher Anavim,)	
Shimon Levy, d/b/a "The Windward)	
Passage Hotel" and Bass Hotels &)	
Resorts, Inc. a Delaware)	
corporation d/b/a "Holiday Inn St.)	
Thomas",)	
)	
Defendant.)	

ATTORNEYS:

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Julie German Evert, Esq.
St. Croix, U.S.V.I.
For the plaintiff,

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For the defendants Joseph Soleimani, Taher Anavim,
Shimon Levy, d/b/a Windward Passage Hotel,

James L. Hymes, III, Esq.
St. Croix, U.S.V.I.
For the defendant Bass Hotels & Resorts, Inc., d/b/a
Holiday Inn St. Thomas.

MEMORANDUM

Moore, J.

Joseph Soleimani, Taher Anavim and Shimon Levy (collectively
"defendants") move for summary judgment, which plaintiff Parveen

Khan ("Khan" or "plaintiff") opposes. For the reasons set forth below, this Court will grant defendants' motion.

I. FACTS

In August 1996, plaintiff, a licensed dentist, entered into a three year lease agreement to rent commercial space on the defendants' property at the Windward Passage Hotel. On or about September 16, 1999, Khan claimed she slipped on tile floor that was wet and struck a building column located outside the gates at the Windward Passage Hotel between the parking lot and the courtyard to the right of the lobby. (Compl. ¶ 13.) Upon the expiration of the lease, Khan had the option of extending the lease for an additional three years or commencing a monthly tenancy. At the time of the events of this matter, the parties were engaged in a monthly tenancy. (Pl.'s Mem. of Law in Resp. to Defs.' Mot. for Summ. J., Ex. 1.) Khan was injured by the fall and has sued defendants for negligence and breach of contract. This Court has jurisdiction under section 22(a) of the Revised Organic Act of 1954¹ and 28 U.S.C. § 1332.

¹ 48 U.S.C. § 1612(a). The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp.2001), *reprinted in* V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp.2001) (preceding V.I. CODE ANN. tit. 1).

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue respecting any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Moreover, matters involving the construction or interpretation of unambiguous contracts are questions of law and are appropriate for summary judgment. See *Amerada Hess Corp. v. Zurich Ins. Co.*, 51 F. Supp. 2d 642, 646 (D.V.I. 1999); *Spink v. General Accident Ins. Co.*, 36 F. Supp. 2d 689, 692 (D.V.I. 1999); *Reed, Wibble & Brown, Inc. v. Mahogany Run Dev. Corp.*, 550 F. Supp. 1095, 1099 (D.V.I. 1982); see also *DiMaglio v. Haines*, 45 F.3d 790, 794 (4th Cir. 1995) (noting that inquiries involving pure questions of law are "always capable of decision at the summary judgment stage") (citations omitted).

B. Interpretation of the Indemnity, Insurance and Waiver Clauses

The lease contains certain provisions that the defendants claim shield them from any liability for Khan's injuries. The plaintiff argues to the contrary and that the lease provisions are ambiguous, at the very least. To determine whether the lease does, in fact, protect defendants from liability, I must look to

the language of the contract to determine the intent of the contracting parties as "objectively manifested by them and make a preliminary inquiry as to whether the contract is ambiguous." See *Sunshine Shopping Ctr. v. Kmart Corp.*, 85 F. Supp. 2d 537, 540 (D.V.I. 2000) (citing *Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 111 (3d Cir. 1994)). I am to focus on the contractual language itself, not the parties subjective understanding of the contract language. See *In re Unisys Corp.*, 97 F.3d 710, 715 (3d Cir. 1996) (citing *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1009 (3d Cir. 1980)).²

Moreover, the contract must be "interpreted as a whole, and all writings that are part of the same transaction are interpreted together." See RESTATEMENT (SECOND) OF CONTRACTS, § 202(2); see also *id.* § 202(2) cmt. d ("Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph, other related writing affects the particular writing, and the

² The parties, of course, may proffer their own interpretations of any disputed provision and support these interpretations with extrinsic evidence. See *American Cyanamide Co. v. Fermenta Animal Health Co.*, 54 F.3d 177, 180-81 (3d Cir. 1995); *Sheet Metal Workers, Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1284 (3d Cir. 1991). The Court must "hear the proffer of the parties and determine if there [are] objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of different meanings." *Sheet Metal Workers*, 949 F.2d at 1284 (quoting *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1011 (3d Cir. 1980)) (alteration in original).

circumstances affect the whole.").³ Thus, a provision in a contract is ambiguous only when it is read in the context of the entire agreement and still is susceptible to more than one meaning. See *Amerada Hess Corp. v. Zurich Ins. Co.*, 51 F. Supp. 2d 642, 648 (D.V.I. 1999); *Coakley Bay Condo Ass'n v. Continental Ins. Co.*, 26 V.I. 348, 770 F. Supp. 1046, 1050 (D.V.I. 1991); see also *Emerson Radio Corp. v. Orion Sales, Inc.*, 253 F.3d 159, 164 (3d Cir. 2000) (quoting *Sumitomo Mach. Corp. of Am., Inc. v. Allied Signal, Inc.*, 81 F.3d 328, 332 (3d Cir. 1996)).

Section 8.1(H) of the lease agreement provides that Khan agreed

[t]o defend, indemnify and hold Landlord harmless from all injury, loss, claims, demands, actions or damage (including attorney's fees and disbursements) to any person or property, arising from among other causes, the negligence of Tenant or any of Tenant's employees or agents related to . . . the use of the Leased Premises or conduct or operation of Tenant's business caused, suffered or permitted by Tenant

While the phrase "arising from among other causes" reveals a clear intent by plaintiff to excuse the defendants from more than just liability for any injuries caused by the negligent acts of Khan and her agents, it does not expressly relieve the defendants

³ Pursuant to 1 V.I.C. § 4, the Restatement is the governing law in the Virgin Islands when no other superseding authority exists.

of liability for their own negligence.⁴ "[A] contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties." *United States v. Seckinger*, 397 U.S. 203, 211 (1970); see also *Beloit Power Sys., Inc. v. Hess Oil V.I. Corp.*, 757 F.2d 1431, 1433 (3d Cir. 1985) ("[A] provision purporting to indemnify a party for its own negligence must clearly and unambiguously express such an intention.")

Section 8.1(I) broadens the defendants' insulation from liability from the tenant's own negligence in section 8.1(H) to injuries Khan may have suffered from defendants' own negligent conduct related to Khan's business operations. Section 8.1(I) requires Khan to obtain liability insurance "against all claims, . . . made by or on behalf on any person, . . . arising from, related to, or connected with the conduct or operation of [Khan's] business" The Third Circuit Court of Appeals has noted that the requirement of obtaining insurance manifests an intent to shift the risk of liability between the parties to

⁴ Defendants reliance on *Eastern Airlines, Inc. v. Insurance Company of North America*, 758 F.2d 132 (3d Cir. 1985) is misplaced, for it is readily distinguishable. In *Eastern Airlines*, ABC Services agreed to indemnify Eastern Airlines from all liability except when Eastern Airlines was *solely* negligent for the injury. The parties there clearly contemplated and intended to excuse Eastern Airlines from liability in those instances where it was only partially responsible for any injury. See *id.* at 134. There is no such similar language in section 8.1(H).

an agreement. See *Eastern Airlines v. Insurance Co. of N. Am.*, 758 F.2d 132, 134 (3d Cir. 1985); *Beloit Power Sys.*, 757 F.2d at 14332; *Willey v. Minnesota Mining & Mfg. Co.*, 755 F.2d 315, 323 (3d Cir. 1985). Such liability-shifting intent is evidenced here through the inclusion of the words "against all claims." While this is evidence of plaintiff's intent to insulate defendants from liability for their own wrongful acts, it is not the clear and unambiguous manifestation of intent that the cases require.

This evidence of intent is made manifest and unambiguous by the provisions of section 8.1(J), by which Khan agreed to waive "all claims for any and all loss . . . incurred in connection with or arising from any injury to Tenant . . . *irrespective of the cause of such injury . . . or from any other cause whatsoever.*" This broadly written waiver provision embodies the express mutual agreement of both Khan, as tenant, and the defendants, as landlord, to insulate the defendants from *any and all* liability resulting from *any* injury to Khan. Therefore, taken together, sections 8.1(H), 8.1(I) and 8.1(J) create an unambiguous intent of Khan to waive her right to hold the landlord liable for its own negligence and to insulate the landlord from liability for Khan's injuries.

C. Waiver Covers Leased Premises and Common Areas

In a final effort to stave off defendants' motion for summary judgment, Khan argues that even if the parties had agreed to waive defendants' liability, this waiver was limited to injuries occurring only on the leased premises. (Pl.'s Mem. of Law in Resp. to Defs.' Mot. for Summ. J. at 14-23.) Plaintiff attempts to interject a genuine issue of material fact to bar defendants' motion by asserting that she fell outside the leased premises.

Section 1.1 of the lease agreement defines the leased premises as "the floor space agreed upon by both parties on the first floor of the Windward Passage Hotel with a court yard entrance in the southeastern section of the court yard." Section 4.0 defines common areas under the control of the defendants as "such areas and facilities . . . including, but not limited to walkways, stairways, entrances, directory signs, rest rooms, and other like public Facilities and utility rooms" Khan alleges that she fell on a public walkway outside the entrance of the Windward Passage Hotel. (*Id.* at 1.) Defendants contend that Khan fell within the court yard. (Defs.' Reply to Pl.'s Opp. to Mot. for Summ. J. at 2.) Even though I agree with Khan that the indemnification clause, section 8.1(H), itself is limited to the

leased premises, plaintiff overlooks the broader scope of the waiver in section 8.1(J).

Included within the language of section 8.1(J) is a specific agreement that defendants would not be liable for and Khan waived all claims to

any and all loss, cost, liability, damage and expense . . . arising from any injury to Tenant . . . irrespective of the cause of such injury, damage or loss (including the acts or negligence of any tenant or occupant of the Windward Passage Hotel or of any owners or occupants of adjacent or contiguous property) and whether occasioned by . . . water being . . . upon or about the Leased Premises or the building . . . or from any other cause whatsoever.

By agreeing to this language, Khan expressly waived the right to sue the defendants for injuries suffered outside the defined leased premises due to the defendants' own negligence. Thus, even if Khan's injury occurred within a common area, as she claims, defendants are still insulated from liability.⁵ I find that the clear intent of the lease agreement was to insulate defendants from liability for any injuries sustained by Khan on either the leased or the common areas of the building.

Regarding the right of parties to a lease to bargain for such waiver provisions, the law in this jurisdiction is quite

⁵ Defendants' alleged negligent acts would be protected because (1) defendants could be considered an occupant of the building or (2) the quoted language is merely a non-exhaustive description of those areas covered by the lease agreement for injuries to plaintiff, "irrespective of the cause of such injury . . . or from any other cause whatsoever."

clear - parties may contract out of liability so long their intentions to do so are unambiguous. *See Jacobs Constructors, Inc. v. NPS Energy Servs., Inc.*, 264 F.3d 365, 373 (3d Cir. 2001); *Eastern Airlines*, 758 F.2d at 135. I find that the parties have clearly incorporated their mutual intent that defendants have no liability to plaintiff for injuries to plaintiff due to defendants' own negligence even within the common areas.⁶ Therefore, as the site of Khan's injury is not a genuine issue of material fact, it cannot preclude defendant's motion for summary judgment.

III. CONCLUSION

Taken together, sections 8.1(H), 8.1(I) and 8.1(J) of the lease agreement manifest the intent to the parties to indemnify the defendants from any injured sustained by the plaintiff on the leased premises or common areas of the building. As there are no genuine issues of material fact and this agreement does not violate public policy, this Court will grant defendants' motion for summary judgment.

⁶ Khan argues that such an interpretation of the lease to include areas under defendants control would contravene public policy. (Pl.'s Mem. of Law in Resp. to Defs.' Mot. for Summ. J. at 24-30.) Defendants' contract with plaintiff to waive defendants' liability to plaintiff for their own negligence even within the common areas does not waive or reduce their responsibility under section 4.0 to maintain these areas. Khan and defendants have bound themselves, and whether they have contracted away their liability to or the rights of third party strangers to the lease is not before me.

Khan v. Windward Passage Hotel
Civ. No. 2000-223
Memorandum
page 11

ENTERED this 14th day of February, 2002.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

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Shimon Levy, d/b/a Windward Passage Hotel,*

James L. Hymes, III, Esq.
St. Croix, U.S.V.I.
*For the defendant Bass Hotels & Resorts, Inc., d/b/a
Holiday Inn St. Thomas.*

ORDER

For the reasons set forth in the foregoing Memorandum of
even date, it is hereby

ORDERED that defendants' motion for summary judgment (Docket
59) is **GRANTED**.

Khan v. Windward Passage Hotel
Civ. No. 2000-223
Order
page 2

ENTERED this 14th day of February, 2002.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

**By: _____/s/_____
Deputy Clerk**

cc: Hon. R.L. Finch
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Hon. J.L. Resnick
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